BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	RM –
the Commission's Rules To Promote	)	
Expanded Free Access To Local Broadcast	)	
Television Stations Via Over-the-Air Reception,	)	
Internet Streaming, or Other Means	)	

PETITION FOR RULEMAKING

MEDIACOM COMMUNICATIONS CORPORATION

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SUMMARY

Universally available, free local broadcast television service is a public good recognized by Congress and promoted by the statutes governing broadcast television. The furtherance of this good requires that, in return for their use of the public's airwaves, broadcasters provide free over-the-air television service that meets the needs of the local communities in which they are licensed to operate. However, while broadcast lobbyists contend that free over-the-air television service is universally available, many broadcast stations do not transmit a viewable signal to significant portions of their local markets and, for the past few decades, the broadcast industry has done exceedingly little to expand the free availability of local television stations to in-market viewers.

Moreover, the unfortunate reality is that broadcasters currently have no incentive to increase the number of viewers receiving free local television service. Retransmission consent fees generate significant income for station owners. Further, the more viewers that are dependent on an MVPD to receive local stations, the more leverage broadcasters have during retransmission consent negotiations. As a result, the broadcast industry's commitment to free over-the-air service is dying, and television viewers all over the country have become subject to retransmission consent-fueled increases in the price of pay-TV service or service disruptions that result from retransmission consent impasses. These price increases and service disruptions hit hardest those viewers retransmission consent was supposed to protect – those that cannot receive local broadcast signals without MVPD service.

The public interest would be well-served by the adoption of rules that create incentives for local broadcasters to extend free access to their signals. In light of the above, Mediacom proposes that the Commission amend its rules to condition a broadcast television station's

license renewal on the station's certification that it will not terminate an MVPD's carriage of the station's signal upon the expiration of a retransmission consent agreement if the station is not accessible via over-the-air reception or Internet streaming to at least 90 percent of the homes in its local market served by the MVPD. The Commission has clear authority to adopt such a rule under Sections 303, 325, and 4(i) of the Communications Act. The Commission should therefore commence a rulemaking to adopt this proposed rule.

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PETITION FOR RULEMAKING

Pursuant to Section 1.401(a) of the Commission's rules,[1] Mediacom Communications Corporation ("Mediacom"), by its attorneys, petitions the Commission to commence a rulemaking proceeding to establish an incentive for broadcast stations to extend free access to their signals by local viewers who are otherwise unable to receive the stations' signals over the air.

Specifically, Mediacom petitions the Commission to seek comment on an amendment to its rules under which a broadcast television station's renewal would be conditioned on the station's certification that it will not terminate an MVPD's carriage of its signal upon the expiration of a retransmission consent agreement while the MVPD continues to actively negotiate if the station's signal is not accessible for free via over-the-air reception or Internet streaming (or some other means) by at least 90 percent of the homes served by the MVPD. By adopting the proposed amendment to its rules, the Commission would be acting in furtherance of the "substantial governmental interest in promoting the continued availability of . . . free

[1] 47 C.F.R. § 1.401(a).

television programming"[2] as well as in fulfillment of its statutory duty to "provide a fair, efficient, and equitable distribution of radio service" among the nation's communities[3] and its obligation to "make available . . . to all the people of the United States of a rapid, efficient, Nationwide, and worldwide wire and radio communications service."[4]

INTRODUCTION

The social compact that exists between the government and broadcast television station licensees (as trustees of the public's airwaves) imposes on broadcasters the obligation to provide free over-the-air television service that meets the needs and interests of the local communities in which they are licensed to operate.[5] However, the reality is that many broadcast stations do not transmit a viewable signal to significant portions of their local markets, including portions of those markets that are within the stations' interference-protected zones of service. Congress acknowledged this reality in the findings accompanying the 1992 Cable Act, declaring that "consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals."[6]

Basing its conclusion on the state of the technology in use in the early 1990s, Congress found that cable television represented "the single most efficient distribution system" for local

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[2] Cable Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12), 106 Stat. 1460 (1992) ("1992 Cable Act").

[3] 47 U.S.C. § 307(b).

[4] 47 U.S.C. § 151.

[5] *In re Broadcast Localism*, Report and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 6 (2008).

[6] 1992 Cable Act, § 2(a)(17).

television stations that were not otherwise available over-the-air.[7] In light of this finding, Congress gave broadcasters must carry and retransmission consent rights with the expectation that doing so would promote the "universal availability of local broadcast signals"[8] and thus ensure that "the "system of free broadcasting remain vibrant and not be replaced by a system that requires consumers to pay for television service."[9]

Fast forward two decades. On the one hand, the digital transition has resulted in fewer viewers having free over-the-air access to local broadcast stations in many markets. On the other hand, technological advances and regulatory developments, such as the authorization of the use by broadcasters of digital television distributed transmission system or "DTS" technology to fill in gaps in their service areas and advances in the distribution of streaming video over the Internet, have created new avenues for broadcasters to extend the reach of their "free" television service to local viewers who are otherwise unable to access the broadcasters' signals without subscribing to a cable system or other multichannel video programming distributor ("MVPD"). Yet, notwithstanding the infusion of billions of dollars in retransmission consent revenues, the broadcast industry has not sought in any material way to expand the free availability of local television stations to in-market viewers. Instead, broadcasters have focused their spending on providing fiber connections between their studios and cable headends or satellite uplink facilities and multiplexing their signals, not extending the public's free access to those signals.

The reason that broadcasters have not made an effort to fulfill Congress' vision of "universal[ly] availabl[e]" free local television service is that they have no incentive to do so. In

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[7] *Id.* at § 2(a)(18).

[8] 138 Cong. Rec. S643 (statement of Sen. Inouye).

[9] S. Rep. No. 102-92, at 36 (1991).

fact, they have a strong incentive to *decrease* the number of viewers who can and do rely on off-air reception, for two reasons. First, the station owner is paid a cash retransmission consent fee for every MVPD subscriber, but is paid nothing for an off-air viewer. Therefore, the more off-air subscribers there are within the market, the lower the retransmission consent revenues collected by the broadcaster. Second, in retransmission consent renewal negotiations, an actual or threatened black-out of the MVPD's subscribers is a far less effective tool for pressuring the MVPD to accede to the broadcaster's demands if the station's signals are readily available off-air. The financial damage to the MVPD from a blackout is significantly reduced if subscribers can get access to the station's programs without switching to another distributor. On the other hand, the greater the number of subscribers for whom off-air reception is not a viable option, the larger the number of subscribers who will switch to a competitive MVPD.

Today's situation is fundamentally different from what it was in 1992. Then, most markets had only a single MVPD – the local cable company – and so the cable system was far less worried by a blackout threat. This is because the broadcaster faced a dramatic decrease in its audience share during a blackout — it would lose all of the viewers for whom off-air reception was unavailable – rather than retaining those who switched to another distributor. This situation contributed to the rough balance of power that the sponsors of the Cable Act anticipated would prevent service disruptions and keep retransmission consent fees in check.[10] Now, however,

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[10] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) (statement of Sen. Inouye):

> It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare.

with multiple MVPDs vying for subscribers, each viewer who cannot obtain a local broadcaster's signal over-the-air *increases* that broadcaster's leverage in retransmission consent negotiations, deterring the broadcaster from expanding the reach of its "free" service within its local markets.

Broadcasters, through their lobbying organizations, pretend that over-the-air service is available to everyone and that they celebrate the growth in the number of viewers relying on off-air reception in place of MVPD service.[11] But this is nothing but propaganda.[12] Given the market dynamics that create incentives for broadcasters to reduce the number of viewers who

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See also 138 Cong. Rec. S14603 (Sept. 22, 1992) (statement of Sen. Bradley) ("I believe that most broadcasters will opt for must-carry while a significant number of other broadcaster will negotiate nonmonetary terms, such as channel position, for the use of their signal . . . the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision.") (Statement of Sen. Bradley).

[11] *See, e.g.,* Press Release, National Association of Broadcasters, NAB Statement on Rep. Eshoo's Draft Retransmission Consent Legislation (Sept. 9, 2013), https://www.nab.org/documents/newsroom/pressRelease.asp?id=3221 ("Fundamentally, there is no such thing as a 'black-out" of broadcast TV programming. Our programming is always on, and always available to viewers on multiple platforms, including free to over-the-air antenna households."); *Oversight: Time Warner Cable, CBS and the Consumers Stuck in the Middle*, Subcomm. on Zoning and Franchises of the New York City Council Comm. on Consumer Affairs at 1 (Aug. 8, 2013) ("Unlike pay subscription service, local television broadcasting is universally available to all New Yorkers, rich and poor, throughout the five boroughs."), *available at* http://www.nab.org/documents/newsRoom/pdfs/080813_Donovan_NYC_Testimony.pdf.

[12] *See* Letter to P. Michele Ellison, Chief of Staff to Commissioner Clyburn, Federal Communications Commission, from Joseph E. Young, Senior Vice President, General Counsel & Secretary of Mediacom, MB Docket No. 10-71, at 2 (Sept. 17, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520944287 ("Mediacom Letter") (stating that the signal strength at NAB President Gordon H. Smith's former Senate office in Pendleton, Oregon, "even assuming the use of an outdoor antenna 30 feet above ground, was only moderate for the Fox-affiliated station, weak for the ABC, CBS and NBC affiliates and non-existent for the PBS station serving the area."); *Does the National Association of Broadcasters Actually Watch Over-The-Air TV?*, AMERICAN TELEVISION ALLIANCE (July 10, 2014), http://www.americantelevisionalliance.org/does-the-national-association-of-broadcasters-actually-watch-over-the-air-tv/ ("Broadcast TV signals are so unreliable, they can't be seen at National Association of Broadcasters headquarters without major rooftop hardware.").

rely on over-the-air reception and the huge sums of money that retransmission consent fees generate for station owners, economic realities mean that the commitment of station owners to the broadcast model is dying, if not already dead.[13] Les Moonves, CEO of CBS, publicly acknowledged this fact when he recently declared, "We're programmers. The term 'broadcasting' doesn't mean anything anymore."[14]

Mr. Moonves' comment is at odds with the social compact that allows broadcasters to use the public airwaves and with the fundamental national policy goal of making free television service "universal[ly] available." Over the past decade, "free" TV has morphed into "fee TV,"

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[13] During blackouts, broadcast station owners focus their advertising and public campaigns on encouraging affected subscribers to switch to a competitive MVPD and downplay or completely ignore off-air reception as an option. For example, in the 2013 blackout of Time Warner Cable ("TWC") customers, CBS ran radio advertisements and created a website informing affected TWC subscribers that they had other choices for viewing CBS shows. None of the ads Mediacom is aware of mentioned off-air reception as a choice, despite the fact that the blacked-out stations are *broadcast* channels that are supposed to be available for free over the air. Similarly, the CBS website told TWC subscribers that "YOU Have Choices," but then listed as the only choice switching to one of a few named pay-TV companies, with not a single mention of off-air reception as an alternative. The primary reason for this omission is undoubtedly the fact that CBS collected retransmission consent fees for TWC customers who switched to one of the named providers, but not for those who turned to over-the-air reception. Given CBS's lack of effort to publicize the off-air option, it is no wonder that during a discussion of the TWC/CBS dispute at the September 10, 2013 "STELA" hearing before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet, Representative Karen Bass (D-CA) expressed complete surprise when told that over-the-air reception might have given her access to CBS during that blackout. *See Satellite Television Laws in Title 17: Hearing Before Subcomm. on the Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary,* 113th Cong. 95 (2013), *available at* http://judiciary.house.gov/_cache/files/c0751009-8001-41a5-bef4-5cabfd65ecf8/113-48-82690.pdf.

[14] John Eggerton, *Moonves 'Broadcasters' Comment Draws Fire From ATVA*, BROADCASTING & CABLE (May 28, 2015), http://www.broadcastingcable.com/news/washington/moonves-broadcasters-comment-draws-fire-atva/141264.

with retransmission consent fees growing 8600 percent between 2005 and 2012.[15] As a result, the very viewers that retransmission consent was supposed to protect – those that cannot receive local broadcast signals without MVPD service but at the same time are least able to afford such service – are the ones being put in harm's way. They are the ones hit the hardest when retransmission consent fees go up or when a station refuses to give consent to the retransmission of its signal, because they are the ones with no option except to bear the considerable expense and inconvenience of switching to another distributor.[16]

Under the circumstances, the public interest would be well-served by the adoption of rules that restore incentives for local broadcasters to extend free access to their signals via over-the-air reception (or Internet streaming or other means). Moreover, such rules are manifestly within the Commission's authority to adopt. Mediacom herein offers one specific approach for achieving this result, but suggests that the Commission also solicit other proposals for expanding the free availability of local television service.

DISCUSSION

I. The Proposed Rule.

Mediacom proposes that the Commission amend its rules to condition a broadcast television station's license renewal on the station's certification that it will not terminate an MVPD's carriage of the station's signal upon the expiration of a retransmission consent agreement if the station is not accessible via over-the-air reception or Internet streaming to at

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[15] *See* Tom Wheeler, *Protecting Television Viewers by Protecting Competition*, FEDERAL COMMUNICATIONS COMMISSION (Mar. 6, 2014), https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.

[16] *See* Mediacom Letter at 1-3.

least 90 percent of the homes in its local market served by the MVPD.[17] In order to minimize the risk that the proposed rule will encourage retransmission consent negotiating impasses, it would not apply if the MVPD has terminated active negotiations with the broadcaster, as defined by the Commission. As indicated above, there may be other ways that the Commission can create incentives for broadcasters to expand free availability of their signals to viewers within their local markets; the Commission should seek suggestions in that regard as part of the requested rulemaking. One example of an alternative worthy of consideration would be to simplify and expedite the ability of MVPDs to construct and operate, at their own expense, antennas that would extend the over-the-air reach of local stations.

II. Adoption of the Proposed Rule Will Serve the Public Interest.

There can be no doubt that ensuring the availability of free local broadcast television service is an important public interest objective. The importance of preserving and expanding the viewing public's access to free broadcast television can be seen in the myriad (and expensive) steps taken by Congress and the Commission to ensure that viewers who did not subscribe to an MVPD continued to be able to receive local broadcast stations during the digital transition.[18] More recently, the Commission concluded that the public interest would be served

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[17] *Cf. In the Matter of Implementation of the DTV Delay Act, DTV Consumer Education Initiative, Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Digital Television Distributed Transmission System Technologies*, Third Report and Order and Order on Reconsideration, 24 FCC Rcd 3399, ¶ 28 (2009) (requiring major network affiliates seeking to terminate analog service prior to the digital transition deadline to certify that at least 90 percent of the population in the terminating station's Grade B analog contour will continue to receive analog service from some other major network affiliate); *id.* at ¶ 38 (requiring stations predicted to lose two percent or more of their analog viewers when transitioning to digital to inform their viewers of this expected loss at least once per day).

[18] *See, e.g., In the Matter of DTV Education Initiative*, Report and Order, 23 FCC Rcd 4134 (2008); *see also* Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109–

by authorizing broadcasters to use DTS technology as a way to provide free over-the-air television service to viewers in a station's local market who would not otherwise be served by conventional means (including rural and remote areas as well as gaps created by natural and man-made obstructions). [19]

Ensuring and expanding the public's access to free over-the-air television service is not merely an end unto itself. It also is a way of advancing the government's interest in promoting and protecting localism. According to the Commission, "[l]ocalism has been a central principle of broadcast policy since the Radio Act of 1927. Broadcasters must serve their communities by providing programming (*e.g.*, news, weather, and public affairs) to meet the needs and interests of those communities."[20] Thus, "every community of appreciable size has a presumptive need for its own transmission service,"[21] and "[f]airness to communities . . . is furthered by a recognition of local needs for a community radio mouthpiece."[22]

The governmental interest in the distribution of locally-oriented and/or originated news and public affairs programming and "other local broadcast services critical to an informed electorate"[23] is inextricably intertwined with the government's interest in the continued

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171, title III, 120 Stat. 4 (2006), *as amended by the* DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

[19] *In re Digital Television Distributed Transmission System Technologies*, Report and Order, 23 FCC Rcd 16731 (2008).

[20] *In re Satellite Delivery of Network Signals to Households for Purposes of the Satellite Home Viewer Act*, Report and Order, 14 FCC Rcd 2654, 2659 (1999).

[21] *Pacific Broadcasting of Missouri LLC,* 18 FCC Rcd 2291, 2293 (2003) (*quoting Public Service Broadcasting of West Jordan, Inc.*, 97 FCC Rcd 12425 (Rev. Bd. 1984)).

[22] *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955).

[23] Pub. L. 102-385 § 2(a)(11).

availability of free television programming, "especially for viewers who are unable to afford other means of receiving programming."[24] Simply put, viewers residing in a station's local market do not benefit from locally-oriented broadcast programming when they cannot view it because they have no free access to the station's signal and either cannot afford to receive the station via a pay-TV service or are blocked from receiving it from their chosen pay-TV service due to a retransmission consent shutdown. Even though it may be possible for viewers suffering due to a blackout during a negotiating impasse to switch providers, it is neither cheap nor easy to do so. Moreover, it is clear from the hundreds of blackouts imposed by broadcasters that most of the affected MVPD's subscribers do not switch and, therefore, those unable to receive the station's signal off-air will not have access to the station's locally originated content. Efforts to carry out Congress's localism policy objectives are necessarily thwarted when a broadcast station does not adequately distribute its programming free to the public either over-the-air or via an alternative platform such as the Internet.

Mediacom's proposed rule is designed to create incentives for local broadcast stations to find ways to increase the number of viewers within their local markets who have free access to the broadcasters' signals. As such, it clearly would advance a number of important public interest goals. For example, while the use of DTS service apparently has not yet caught on in many areas where it could benefit viewers who lack access to their local broadcast stations via over-the-air reception, adoption of the rule proposed herein could help trigger renewed interest in and deployment of what the Commission considers a very cost-effective and efficient means of extending a station's over-the-air reach.

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[24] Pub. L. 102-385 § 2(a)(12).

Even more directly, Mediacom's proposal would benefit the viewers within a broadcast television station's local market who can only access the station's locally-oriented programming by subscribing to a pay-TV service. These viewers are at the mercy of retransmission consent-fueled increases in the price of pay-TV service or service disruptions that result from retransmission consent impasses. Moreover, an increasing number of these viewers are "cutting the cord" and relying on over-the-top video services that offer, at most, access to broadcast network programming, not local content. For these viewers, the fact that their local broadcast signals are not available to them for free means that they have no access to the locally-oriented news, sports, public affairs, and entertainment programming that is supposed to distinguish broadcasting from other video services.

Of course, the public interest benefits of the proposed rule are not limited to viewers who currently have no free access to their local broadcast stations and thus have to choose between going without local broadcast programming or paying the increasing cost of receiving "free" television from a pay-TV service. Even viewers who have free access to broadcast service but nonetheless receive broadcast signals as part of their MVPD service will benefit from the moderating effect that the proposed rule will have on out-of-control retransmission consent fee increases and on the use of shutdowns to force MVPDs (and their customers) to accept such increases.

In addition, linking the extent to which viewers can receive local broadcast signal for free to a station's right to refuse to extend an expiring retransmission consent agreement is appropriate, since the underlying purpose of Congress' decision to give local broadcasters retransmission consent rights was not to enrich broadcasters – it was to further the public policy goal of ensuring free access across America to local news and public affairs programming.

Congress did not envision that those subscribers who did not have access to local signals over-the-air would be left in the dark because of the skyrocketing price of "free" television and retransmission consent-related blackouts.[25]

Finally, evidence shows that the billions of dollars of retransmission consent fees collected flow not to local stations themselves for use to produce more or better local programs, but into the coffers of the big corporations that own the vast majority of the nation's broadcast stations, where they are used primarily for executive salaries, dividends, stock buybacks and acquisitions.[26] Requiring that some of the billions of dollars that station group owners collect annually be devoted to largely non-recurring expenditures to increase off-air availability of broadcast television would be entirely consistent with Congress' goals underlying creation of the mechanism that produces those revenues. Mediacom's proposal would help remedy the issues of blackouts and retransmission fee related price hikes by creating incentives for broadcasters to use their retransmission consent revenues to help ensure the free availability of local broadcast signals.

III. The Commission Has the Authority to Adopt the Proposed Rule.

The conclusion that adoption of the rule proposed herein would serve the public interest goes hand-in-hand with the conclusion that the Commission has the requisite authority to adopt such a rule. It is well-settled that "[t]he Communications Act gives the Commission broad

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[25] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) (colloquy between Senators Burdick and Adams and Senator Inouye).

[26] Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Joseph E. Young, Senior Vice President, General Counsel & Secretary of Mediacom, MB Docket No. 10-71, at 1-2 (July 19, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520931906.

authority to regulate the broadcast medium as the public interest requires"[27] and that the Commission's authority "includes wide discretion in granting, revoking, conditioning, and extending licenses in furtherance of the public interest."[28] As the Supreme Court stated over 70 years ago:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end, Congress endowed the [FCC] with comprehensive powers to promote and realize the vast potentialities of radio.[29]

The primary source of the Commission's broad rulemaking authority over broadcasting is Section 303(r) of the Act, which empowers the Commission, "as the public interest, convenience, and necessity requires," to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the] Act."[30] The Supreme Court has elaborated on the broad rulemaking authority granted to the Commission by the Act, explaining that "it is now well established that this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable."[31]

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[27] *Violent Television Programming And Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394, ¶ 24 (2004).

[28] *Ellis v. Tribune TV Co.*, 443 F. 3d 71, 73 (2d Cir. 2006).

[29] *National Broadcasting Co., Inc. v. United States,* 319 US 190, 217 (1943); *see also id.* at 219 ("the Act gave the Commission not niggardly, but expansive, powers. It was given a comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest[.]'"); *accord United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

[30] 47 U.S.C. § 303(r).

[31] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978); *see also United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (DC Cir. 1989) (explaining that Section 303(r)

The proposed rule easily falls not only within the broad scope of the Commission's authority to regulate the broadcast industry, but also within several specific grants. For example, Section 303(g) specifically directs the Commission to "generally encourage the larger and more effective use of radio in the public interest" and Section 303(h) acknowledges the Commission's authority "to establish areas or zones to be served by any station." Moreover, the proposed rule is comparable to other rules adopted pursuant to the Commission's authority to promote the public's interest in the availability of reliable over-the-air reception, including rules requiring television stations to broadcast for a minimum number of hours each day,[32] and limiting the circumstances during which a broadcast station can be dark without Commission authorization.[33]

Moreover, the proposed rule is not inconsistent with Section 325 or any other provision of the Communications Act. While the broadcast industry has repeatedly argued that Section 325 precludes the Commission from taking any action that interferes with "free marketplace" for retransmission consent, it has long been recognized that "the interest of the...public is paramount to the private interests of the licensee" and that "Commission intervention is warranted if a licensee's private interest and the public interest are incompatible, *i.e.*, if the private interest poses 'a substantial risk of serious harm to [viewers].'"[34] In any event, the proposed rule would

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should be interpreted to mean that where the Commission has found adoption of certain rules relating to broadcasters to be necessary to carry out the Commission's public interest mandate under the Act, "they fall under the Commission's § 303(r) powers unless they are 'inconsistent with law'").

[32] 47 C.F.R. § 73.1740(a)(2).

[33] 47 C.F.R. § 73.1750.

[34] *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, Memorandum Opinion and Order and Notice of Apparent Liability, 7 FCC Rcd 1503, 1507 (1992), *citing KFKB Broadcasting Association v. Federal Radio Commission*, 47 F.2d 670,

not "dictat[e] the outcome" of retransmission consent negotiations, compel a particular outcome or otherwise prescribe the terms and conditions under which MVPDs may retransmit broadcast signals.[35] Rather, it merely would restore to those negotiations the balance in negotiating power that Congress expected would minimize the risk that viewers would lose access to local broadcast service. As such it is a proper exercise of the "broad discretion" over retransmission consent that Congress has granted the Commission.[36]

Lastly, the Commission's "ancillary" jurisdiction under Section 4(i) of the Act provides a further source of authority for the proposed rule. With regard to the Commission's ancillary jurisdiction, the proposed rule is reasonably related to the Commission's effective performance of its statutorily mandated responsibility to "provid[e] a widely dispersed radio and television service" with a "fair, efficient, and equitable distribution" of service among the "several States and communities."[37]

A spokesman for NAB recently acknowledged that Congress, through the Communications Act, has sought to "guarantee consumers free access to the lifeline and investigative reporting produced by local TV stations via a digital antenna."[38] Creating incentives for broadcasters to fulfill their duty to serve the public interest by expanding viewers'

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671 (1931); *Elimination of Unnecessary Broadcast Regulation*, Policy Statement and Order, 57 RR2d 913, 921 (1985).

[35] *Id.* at ¶ 32.

[36] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, ¶¶ 30-31 (2014) (Congress has granted the Commission "broad discretion" to adopt rules implementing Section 325).

[37] *United States v. Southwestern Cable Co., supra*, 392 U.S. at 173-74; *see also American Library Ass'n v. FCC*, 406 F. 3d 689, 691-91 (D.C. Cir. 2005).

[38] *See* Eggerton, *supra* note 11.

access to free television service within a station's local market clearly serves the public interest. Thus, the proposed rule falls squarely within the Commission's authority.

CONCLUSION

For the reasons stated above, the Commission should commence a rulemaking proceeding to adopt the rule proposed herein.

Respectfully submitted,

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